Supreme Court, U. S.
FILED
SEP 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1823

L. B. MCFARLAND, *Petitioner*

v.

STATE OF GEORGIA, *Respondent*

PETITIONER'S SECOND SUPPLEMENTARY BRIEF

HERBERT SHAFER
Attorney for Petitioner
620 Peachtree St., N.E.
Mezzanine Level
Atlanta, Georgia 30308
Tel: (404) 881-0607

BERNARD H. DEMPSEY, JR.
Attorney for Petitioner
Suite 704, Pan American
Bank Bldg.
250 North Orange Avenue
Orlando, Florida 32801
Tel: (305) 422-5166

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1823

L. B. MCFARLAND, *Petitioner*

v.

STATE OF GEORGIA, *Respondent*

PETITIONER'S SECOND SUPPLEMENTARY BRIEF

INTRODUCTION

After the Petitioner filed his Petition in this case, this Court decided the case of *Stone* v. *Powell,* — U.S. —, 49 L.Ed.2d 1067 (1976). Its impact on Federal review of searches and seizures provides an additional reason for this Court to grant certiorari in this case.

FEDERAL REVIEW

The Fourth Amendment guarantees the right of citizens "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Traditionally, that right has been preserved, in part, by the Writ of Habeas Corpus in federal courts.

When this Court in *Stone* v. *Powell, supra,* held that federal habeas corpus will no longer be permitted in

cases where the state court has examined the validity of the search, it drastically cut down the scope of review of searches conducted by state agents. In fact, this Court is now the *only* federal forum where Fourth Amendment rights can be asserted in these cases.

It thus becomes appropriate, in an application for certiorari based on an illegal search and seizure, for this Court to examine very carefully the procedures below to insure that a full and complete hearing was conducted in the state court.

THE RULE IN STONE v. POWELL

The Court's ruling in *Stone* v. *Powell, supra,* was predicated on two assumptions: (1) That the State has provided an opportunity for a fair litigation of the Fourth Amendment claim (*Stone* v. *Powell,* — U.S. —, 49 L.Ed.2d at 1080), and (2) That this Court provides an adequate safeguard through its oversight jurisdiction on certiorari (*Stone* v. *Powell,* — U.S. —, 49 L.Ed.2d at 1087 Fn. 35).

The importance of these assumptions was recently recognized by Mr. Justice Gunter of the Georgia Supreme Court. In a dissenting opinion, he said as follows:

> "If the Georgia Supreme Court will not enforce this constitutional principle, it now seems that the only other place for attaining its enforcement is in the Supreme Court of the United States. In Stone v. Powell [cit.], the Supreme Court of the United States has ruled that search and seizure claims, unsuccessfully asserted in state criminal proceedings, cannot be raised in federal habeas corpus review of state convictions."
>
> *Connally* v. *State,* 237 Ga. 203, 213, — S.E.2d — (1976) (dissenting opinion).

As Mr. Justice Gunter noted, review of appellate decisions arising from state searches and seizures can now be made only in the Supreme Court of the United States.

THE STATE COURT HEARINGS

Although this case has travelled through three Georgia courts, (1) The State Court of Lowndes County, (2) The Georgia Court of Appeals, and (3) The Georgia Supreme Court, all three not only failed to analyze and apply the rules of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 394 U.S. 410 (1969), to the facts of this case, but they totally ignored them; the Court of Appeals in its opinion did not even mention *Aguilar* or *Spinelli.*

Aguilar and *Spinelli's* rule that facts be set out to show the basis of the informant's belief that the target of the search is engaging in criminal conduct was totally ignored. In short, the Petitioner's hearing below and appellate review thereof was neither "full" nor "fair". *Stone* v. *Powell,* — U.S. —, 49 L.Ed.2d at 1080.

Here, unlike the respondents in *Stone* v. *Powell, supra,* the Petitioner did not take any procedural short-cuts by abandoning his right to seek review by this Court. Cf. *Stone* v. *Powell,* — U.S. —, 49 L.Ed. 2d 1088 Fn. 38. Admittedly this Honorable Court took on quite a burden by suggesting that, henceforth, although the habeas route was closed, appeal to this Court was a viable avenue, thus keeping alive the promise of *Mapp* v *Ohio,* 367 U.S. 643 (1961), that federal courts will maintain oversight in state search and seizure cases and that the Fourth Amendment will not become, in practice "a teasing illusion like a mu-

nificent bequest in a pauper's will." *Edwards* v. *California,* 314 U.S. 160, 186 (concurring opinion), cited in *North* v. *Russell,* — U.S. —, 49 L.Ed.2d 534, 544 (1976) (dissenting opinion).

CONCLUSION

The facts in this case clamor for review by some tribunal which will apply the teaching of *Aguilar-Spinelli.* Thus far its teaching has been entirely ignored by the Georgia courts in which the Petitioner McFarland was tried and to which he appealed. Should this Court refuse to listen to him as well, then he will have been denied any meaningful review of his claim that his constitutional rights have been flouted and denigrated. This is a bleak prospect indeed, but the Petitioner herein believes that, unless this Court is prepared to overrule and discard the rule of *Aguilar-Spinelli,* his conviction must be reversed.

Respectfully submitted,

HERBERT SHAFER
Attorney for Petitioner
620 Peachtree St., N.E.
Mezzanine Level
Atlanta, Georgia 30308
Tel: (404) 881-0607

BERNARD H. DEMPSEY, JR.
Attorney for Petitioner
Suite 704, Pan American
Bank Bldg.
250 North Orange Avenue
Orlando, Florida 32801
Tel: (305) 422-5166